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site) doctrine would strike a fatal blow to all discounts of negotiable instruments. It is for the benefit of the commercial world to give as wide an extension as possible to commercial paper."¹²

T. K. F.

CONSTITUTIONAL LAW—COMPULSORY WORKMEN'S COMPENSATION—In three decisions recently handed down, the Supreme Court of the United States upheld the constitutionality of Workmen's Compensation as applied in several of the states.¹ In the Hawkins case the act extends to all employments with slight exceptions, and to injuries arising out of and in the course of the employment. The statute is elective in form, but compulsory in effect, as any employer who rejects its provisions is deprived of his common-law defenses, and has the onus of establishing his exercise of due care. In the White case the New York law covers forty-two groups of "hazardous employments," the liability being in general without regard to fault and exclusive of other remedies. The employer may secure compensation by insurance either in a state fund, in a specially authorized insurance company, or by self-insurance in proper cases. The Washington statute covers enumerated industries characterized as "extra-hazardous" (which, however, include practically all the industrial activity of the state), and all injuries "incurred upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer." The salient and distinguishing feature of the Washington Act is that the source of compensation is derived solely from a state fund maintained by compulsory contributions from employers, the amount of premiums paid by each employer being determined by the hazard of the particular industry in which he may be engaged.

To the objection that under these acts an employer is subjected to liability without fault on his part, the court, in its opinion, points out numerous instances in which recovery has been allowed without regard to fault or negligence. It is further noted that negligence is merely the disregard of some duty imposed by law, and the nature and extent of the duty may be modified by legislation with corresponding change in the test of negligence, or without negligence other than a failure to comply with a statutory duty.² The common-law doctrines of assumption of risk, of contributory negligence . . . are stated to be mere fictions of the common law, and, as such, not beyond alteration by legislation in the public interest. Great emphasis is placed upon the fact that all common-law rules respecting the

¹² Story, J., in *Swift v. Tyson*, 16 Pet. 1 (U. S. 1842).

¹ *New York Central R. R. v. White*, 37 Sup. Ct. Rep. 247 (1917); *Hawkins v. Bleakly*, 37 Sup. Ct. Rep. 255 (1917); *Mountain Timber Co. v. Washington*, 37 Sup. Ct. Rep. 260 (1917).

² *New York Central R. R. v. White*, *supra*, p. 251.

liability of employer and employee are not violently set aside, but that another, and a reasonably just substitute, is provided. Indeed, a doubt is suggested as to the authority of the state to abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.

In considering whether the acts are arbitrary or unreasonable the court is led to place the principle of compensation upon some ground of natural justice, and the economic theory advanced is, that losses arising in the course of employment are part of the cost of production, and should be charged up to the employer in the same manner as the cost of repairing broken machinery. The pecuniary loss, it is also declared, should fall upon the employer because it results from something done in the course of an operation from which he expects to derive a profit, with the added thought that the modified assumption of risk by the employee and the fixed responsibility of the employer will be reflected in the wage scale.

It must be confessed, however, that it is difficult at times to grasp the exact legal-economic doctrine upon which the system of Workmen's Compensation is rested. At one point the court seems to consider the relation of employer and employee as a mutual enterprise, but, it would seem, an enterprise out of which the employer alone expects to obtain a profit.³ In addition to this community of interest between the employer and employee, the paramount concern of the state in the relation is emphasized. The theory that the status of employer is a franchise, and that conditions precedent thereto may be imposed by the state, is not advanced.⁴ But it is unequiv-

³ "The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to the one more remote, the primary cause as it may be deemed, and that is, the employment itself. For this both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death, to those entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence." *New York Central R. R. v. White*, *supra*, p. 253.

⁴ *Cf. Noble State Bank v. Haskell*, 219 U. S. 104, 113 (1910).

ocally stated that such statutes have a direct relation to the protection of the lives and health of a large and important element in the community, and are a reasonable exercise of the police power.⁵

In upholding the Washington statute and the method therein adopted of creating the compensation fund solely by premiums based upon the risk of the particular industry, the decision constitutes a definite advance upon the previous cases. This feature of the act is somewhat unusual; moreover, it is difficult to perceive precisely what public purpose is subserved by computing the rate of insurance with reference to the risk of each industry. It has been urged against the compensation scheme that under it the carefully managed plants will be required to make good the losses arising through the negligence of their competitors. Under the Washington Act exactly this result would seem to be produced. The majority of the court meets this contention by pointing out that: "Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, . . . the state may impose the entire burden on the industries that occasion the losses, irrespective of the particular plant in which the accident may happen to occur."⁶ This fatalistic conception which views industrial accidents as inevitable, colors the opinion of the court in each of the decided cases. It is submitted, however, that while industrial accidents are inevitable, their relative frequency varies not only with the industry, but also with the precautions and safeguards adopted by a particular plant. With precisely this in view many of the acts permit a form of self-insurance by which the employer is stimulated to the utmost degree of care, and the adoption of the best form of safety devices. It is true that the provisions of the Washington Act will place upon the employer the indirect pressure of his competitors, and probably will be supplemented by other acts requiring the adoption of safety appliances.

This feature of the act is upheld by reference to *Noble State Bank v. Haskell*,⁷ the court declaring that: "The idea of special excise taxes for regulation and revenue apportioned to the special injury attributable to the activities taxed is not novel." In that case, and in the numerous cases cited in support of this principle, several additional elements were present which would seem to have justified the mode adopted of apportioning the burden. In a typical case where a tax is laid on dogs to compensate sheep owners for injuries to sheep inflicted by dogs, there is an initial difficulty in tracing the source of the damage sustained. In such cases it is the expense and difficulty, or even the impossibility, of affirming the liability that

⁵ *Barbier v. Connolly*, 113 U. S. 27 (1884); *Lawton v. Steele*, 152 U. S. 133 (1893); *Holden v. Hardy*, 169 U. S. 366 (1897); *Second Employers' Liability Cases*, 223 U. S. 1 (1911).

⁶ *Mountain Timber Co. v. Washington*, *supra*, p. 267.

⁷ 219 U. S. 104 (1910).

justifies the sweeping provisions of the act. In the Bank case this takes the form of a mutual interdependence by which the most careful bank is, to a not inconsiderable extent, at the mercy of the most reckless. In addition, the broad and rigid control which the state exercised over the banks brought them all within a certain minimum degree of careful and efficient management. The insurance sought to be secured was not against the inevitable and easily computed hazards of careful management, but against the uncertain disasters of speculative and illegal banking. The uniformity of the assessment was justified by the uniformity (due to the uncertainty) of the risk. In the practical administration of Workmen's Compensation, no such mutual interdependence is apparent; the frequency of accidents in any particular establishment, especially in the larger plants, cannot be termed uncertain.

Worthy of note is the very little stress placed by the court upon the degree of hazard required to place an industry within the scope of the compensation acts. By the Washington Act almost every industry is classified as hazardous. To the objection raised against such classification, it is answered: "The question of whether any of the industries enumerated is non-hazardous will be proved by experience,"⁸ and the provisions of the act form sufficient assurance that if in any industry there be no accident, there will be no assessment unless for expenses of administration." If the foregoing is intended to imply that every industry in which an accident occurs may be classified as hazardous, and such appears to be the import of the words used, the court would seem to have been guilty of a *non-sequitur*. The court, indeed, may have intimated that so far as the burden of its three opinions was concerned, an employee had an equal right to compensation whether his calling be hazardous or non-hazardous. In either case the effect upon the person injured, his family and dependents and upon the community would seem to be identical. The reasoning which would rest the right of the state to prescribe a system of compensation upon the inevitability of numerous accidents and would limit the police power to cover industries only where accidents are frequent, it is submitted, is narrowly legal, and in no sense economic.

Of great significance is the absence of comment upon those features of the acts which restrict the right of recovery to accidents in the course of the employment. If Workmen's Compensation is considered part of the cost of production, the scope of such acts must be limited to injuries arising out of the industry. The somewhat broader provisions of the Washington Act, though scarcely noted by the court, should not be over-emphasized, in view of the frequent recurrence in the opinions of the phrase "loss arising out of the business," and equivalent expressions. However, it may be noted that the

⁸ Past experience does not seem to be considered.

court does not seem to consider the more extended provisions of the Washington Act a sufficient departure from the New York Act to animadvert thereon.⁹ The status of an act which would award compensation irrespective of the source of the injury must therefore be deemed uncertain. Certainly a statute which covers every injury sustained on the plant of the employer is beyond the scope of Workmen's Compensation in its narrow sense. With the constitutionality of these statutes now definitely established, a broader application of the underlying principles would seem to be indicated in the direction of accident insurance. Certainly their practical administration will necessitate also a more stringent control by the state, over each industrial plant.

B. W.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — POLICE POWERS—PROHIBITION OF BILLBOARDS IN RESIDENTIAL DISTRICTS—A recent decision of the Supreme Court of the United States has determined that it is within the police power of a municipality to regulate the size, material, manner of construction and the place of erection of billboards as a special class of structure; and that such regulation does not deprive any person of his liberty or property without due process of law, or of the equal protection of the law,—at least so far as the Constitution is concerned.¹ In that case an ordinance of the city of Chicago made it unlawful to erect any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, without first obtaining the written consent of the owners of a majority of the frontage of the property on both sides of the street; and the Supreme Court held that such an ordinance was justifiable as a reasonable exercise of the police power of the municipality, and, as such, did not conflict with the Fourteenth Amendment. In the course of its opinion, the court points out that refuse of all descriptions frequently collects around and behind such structures, so that they become a menace to health; while they also jeopardize the safety and morality of the community by facilitating the start and spread of fires, and by affording a convenient concealment and shield for immoral practices, and for loiterers and criminals. For these reasons, say the court, billboards are to be considered as a class by themselves, as distinguished from buildings and fences. Thus the court justifies at least a partial prohibition of the erection, upon private property, of billboards, as such, without regard to their manner of construction.

⁹ This particular feature of the act was not emphasized by counsel for the Mountain Timber Company.

¹ *Cusack v. Chicago*, 37 Sup. Ct. 190 (1917).